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In the

Supreme Court of the United States

October Term, 1975

No. 75-1195

Tams-Witmark Music Library, Inc.,

Petitioner,

vs.

Municipal Court, Sacramento Municipal Court District, County of Sacramento,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

Brief for Respondents in Opposition

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I.

JURISDICTION

The technical jurisdictional requirements appear to be set forth adequately in the petition. It is to be observed, however, that petitioner's contentions were rejected by the courts of the State of California based upon and in conformity with the pertinent decisions of this Court and the California courts.

II.

QUESTION PRESENTED

Whether the California Court of Appeal was correct in holding that petitioner's leasing and renting of musical scores, scripts and dialogues, in connection with its licensing activities, to many individuals and groups in California constituted sufficient contact with California to support its exercise of personal jurisdiction over petitioner.

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment XIV, § 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

California Code of Civil Procedure § 410.10:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

IV.

STATEMENT OF THE CASE

The State of California brought an action in respondent Municipal Court alleging that petitioner Tams-Witmark Music Library, Inc., a New York corporation, owes it $3,173.12 in taxes, interest and penalties under the California Sales and Use Tax Law, California Revenue Code Sections 6711-6715. Petitioner appeared specially and moved pursuant to California Code of Civil Procedure Section 418.10

to quash service of summons on the ground that respondent court lacked personal jurisdiction over it. Specifically, petitioner alleged that it is a foreign corporation which is neither present nor doing business in the State of California, and that the Due Process Clause of the Fourteenth Amendment prohibited the assertion of personal jurisdiction over it.

The petitioner admitted that it licensed various amateur and professional individuals and groups to produce copyrighted musical plays in California. The petitioner also leased or rented for varying lengths of time musical scores, dialogues, scripts and other materials to California individuals and groups in connection with the licensing.

The California Court of Appeal affirmed the decision of the Superior Court denying petitioner's request to quash service of summons. The petitioner's application for a hearing before the California Supreme Court was denied.

V.

ARGUMENT

A. Petitioner Has Not Been Deprived of Due Process of Law.

This case was correctly decided in accordance with the criteria and standards established by the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945), and *McGee v. International Life Ins Co.*, 355 U.S. 220 (1957). In the latter case, for example, the insurance company had neither office nor agents in California. In fact, it had not even solicited anyone for insurance prior to the solicitation of the insured in that case. Yet this Court held that for purposes of due process the suit was based on a contract which had substantial connection in California. In this regard the Court stated:

> "The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." *Id.* at 223.

Here more contacts exist than were present in *McGee v. International Life Ins. Co. supra.* Petitioner advertises in magazines delivered to California. Payment is made from California. The tangible personal property is leased or rented in California and at the termination of the agreement is returned to petitioner. The petitioner has clearly availed itself of the privileges and benefits of this state so as to subject it to California's jurisdiction. These acts of the petitioner undisputably bring petitioner within this Court's boundary, namely, that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

The trend, as established by this Court, has been toward reducing the "minimum contacts" required for constitutional exercise of personal jurisdiction over an out-of-state defendant. State of California has also followed this trend.

Each case must be examined on the basis of its own facts. "Whether a corporation has the requisite minimum contacts depends upon the facts involved in the particular case (citations omitted)." *Tiffany Records, Inc. v. M. B. Krupp Distributors, Inc.,* 276 Cal.App.2d 610, 81 Cal.Rptr. 320 (1969).

Then in the very recent case of *Belmont Industries, Inc., v. Superior Court,* 31 Cal.App.3d 281, 107 Cal.Rptr. 237 (1973), the court announced that,

> "In deciding whether jurisdiction reasonably may be assumed we must analyze the nature and quality of petitioners' activities in relation to the state. (Citations omitted.)" *Id.,* at 286.

It appears that petitioner's principal contention is that its leasing of musical and dialogue materials was purely incidental and ancillary to the petitioner's transaction of other business, which is the licensing of theatrical production rights in return for the payment of royalties. Petitioner seeks to divorce the two elements of its business. That does not make sense. The act of leasing dialogue and musical and other materials is more than incidental and ancillary to the licensing of the theatrical production rights. Each is necessary for the other.

Petitioner further argues strongly that it has no contacts with California. It is true that petitioner has no place of business, sales representatives or agents, or property in California. But the mere absence of such tangible elements alone is not sufficient to deprive California of jurisdiction where appropriate. The use of a mechanical checklist approach to determine the existence or nonexistence of purposable activity within the state "fails to focus on economic reality rather than the outward business transactions and is disapproved." *Buckeye Boiler Co. v. Superior Court,* 71 Cal.2d 893, 903 (1969).

In the present case, in almost every situation where a school, church, professional theatrical group, amateur theatrical group, or any other individual or group of individuals desire to produce or put on plays anywhere in the State of California, they must almost always obtain permission from and pay petitioner because it occupies a highly dominant position in this field. It is clear that petitioner derives substantial economic benefits from the use by schools, churches, amateur and professional theatrical groups, and other sundry organizations of the various printed materials, dialogues, scripts, music sheets and other materials furnished by petitioner in California. The tangible personal

property which is sent to California residents in connection with the licensing of the theatrical production rights is used in California. This tangible personal property is absolutely essential to the production of the theatrical plays.

Petitioner has grossly mischaracterized the holding of the California Court of Appeal. The latter court did not hold that even the most minimal use of personal property in California by a third party will require the non-resident owner of that property to come to California and defend an action for collection of taxes. The Court only held that petitioner, who occupies a highly dominant position in the leasing and renting musical scores, scripts and dialogues in connection with licensing for the use of copyrighted materials, and who actually did so lease and rent such materials to schools, churches, professional and amateur theatrical groups and sundry individuals in California on a systematic basis, is subject to personal jurisdiction in this State.

Here petitioner has systematically exploited the California market. Here California provided petitioner with the benefits and opportunities of its laws with respect to the tangible personal property which was being leased or rented to California individuals and groups. To say that California's action is inconsistent with traditional notions of fair play, which is the essence of due process, is totally erroneous in light of petitioner's activities in California.

Many of the cases cited by petitioner are now being cited for the first time. Other cases such as *Interdyne Co. v. SYS Computer Corp.*, 31 Cal.App.3d 508, 107 Cal.Rptr. 499 (1973) and *Belmont Industries v. Superior Court, supra,* at 281, are so far removed from the facts in this matter that they deserve no consideration. Both of those cases involved situations where a California business sought to sue its out-of-state customer in California.

Finally, the fact the State Board of Equalization has an office in New York is irrelevant. If California sued in New York, California would be required to retain New York counsel, transport witnesses such as petitioner's California customers to New York and have a New York court try an issue of California tax law. Most interesting, however, is the fact that petitioner came to California and personally contested the administrative assessment of taxes on the merits before a California administrative agency and successfully had the assessment reduced. Petitioner took advantage of California's administrative procedures to the fullest extent, knowing that had it prevailed there, it would thereby avoid any tax liability to the State.

There could be no inconvenience for petitioner to produce the evidence of what it now calls a very meager measure of tax of approximately $10,950.00 per year for four years. All of the persons who used petitioner's tangible personal property and who would be witnesses in this matter, reside in California. The testimony of some of these individuals would be essential for respondent.

The State of California's interest in providing a forum for itself in California with respect to California tax matters is paramount, particularly where the taxes are based on the use by petitioner of its assets in California through the lease of tangible personal property to California residents. The taxpayers of this state should not be called upon to foot the bill for maintaining legal proceedings in the State of New York to collect taxes arising out of transactions concerning the use by petitioner of its property in California.

B. In Arguing About the Purpose of the Federal Copyright System, Petitioner Erroneously Seeks to Raise a New Issue for the First Time on Appeal, an Issue on Which No Evidence Was Ever Presented.

Petitioner's introductory statement in its Argument B is misleading inasmuch as the statement implies that petitioner's activities in this state were merely passive in nature. However, petitioner failed to point out, as it stated on page 3 of its petition for hearing, that in connection with the licensing activities, petitioner makes specialized transcripts and dialogue materials available to licensees on a temporary basis to enable them to produce the plays. Certainly there cannot be any difference between the sending of tangible personal property into California and the sending of written materials into this state.

The petitioner's statements and contentions pertaining to the undermining of the objectives of the federal copyright system are totally inappropriate in this brief inasmuch as that contention was never previously raised although appellant twice had ample opportunity to do so, once at the Superior Court level and then later before the Court of Appeal. In fact petitioner waived oral argument before the California Court of Appeal and did not even bother to file a reply brief to respondent's brief as provided by the California Rules of Court. The first time petitioner made any argument regarding the federal copyright system was in its petition for a hearing before the California Supreme Court.

It would be improper to allow petitioner to raise the issue of the federal copyright system for the first time in this Court. For this Court's information we are attaching as Appendix "A", a copy of petitioner's opening brief, which was the only brief petitioner filed before the California Court of Appeal. That brief will totally refute

petitioner's footnote 4 on page 6 of its petition for writ of certiorari before this Court that it had previously raised the argument pertaining to the federal copyright system. Moreover, there was no evidence introduced at any point in this prolonged proceeding as to what is the nature of the federal copyright system. Nor was there any evidence introduced that California's decision would subject every copyright owner to personal jurisdiction in California.

Petitioner's case was decided on its own facts and the application to them of well established principles of law. The petitioner completely failed to present any facts to show that the respondent violated any federal law.

C. Petitioner Never Refuted the Applicability of the Case of Union Oil Co. v. State Board of Equalization, 60 Cal.2d 441 (1963).

Although respondent had discussed the case of *Union Oil Co. v. State Bd. Equal.*, 60 Cal.2d 441 (1963), extensively in its respondent's brief before the California Court of Appeal and discussed its applicability to the present case, petitioner totally ignored respondent's discussion of the *Union Oil* case. In fact, petitioner did not file a reply brief to refute or contest any of the respondent's discussions regarding the *Union Oil* case. As in the issue of the federal copyright system and its purposes, it is totally inappropriate for petitioner to discuss the *Union Oil* case at this late date when it waived its opportunity to do so before the California Court of Appeals. (Please see Appendix A which contains no reference to the *Union Oil* case by the petitioner.)

D. This Case Does Not Warrant Review by This Court.

The California courts clearly and succinctly answered the issue. The petitioner seeks to obfuscate the issues now

by belatedly discussing the federal copyright system and the First Amendment right of freedom of expression. On the basis of the facts presented, the California courts found that petitioner had sufficient contacts with California "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 316-17, supra.

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: March 16, 1976.

Respectfully submitted,

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Appendix "A"

3 CIVIL 15070

In the

Court of Appeal of the State of California

Third Appellate District

Tams-Witmark Music Library, Inc.,
Petitioner and Appellant,

vs.

Municipal Court, Sacramento Municipal Court District, County of Sacramento,
Respondent,

People of the State of California,
Real Party in Interest.

APPELLANT'S OPENING BRIEF

Appeal from the Order of the Superior Court of the State of California for the County of Sacramento

Honorable LLOYD A. PHILLIPS, JR., Judge

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3 Civil 15070

In the

Court of Appeal of the State of California

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APPELLANT'S OPENING BRIEF

Appeal from the Order of the Superior Court of the State of California for the County of Sacramento

Honorable LLOYD A. PHILLIPS, JR., Judge

INTRODUCTION

The State of California has brought an action in the respondent Municipal Court, Sacramento Municipal Court District, pursuant to the California Sales and Use Tax Law, California Revenue and Tax Code §§ 6711-6715, claiming that appellant Tams-Witmark Music Library, Inc. (hereinafter "Tams-Witmark"), a New York corporation, owes the State of California $3,173.12 in taxes, interest, and penalties under said Sales and Use Tax Law. Appellant contends that respondent Court lacks jurisdiction over

it, and it therefore filed a Motion to Quash Service of Summons, pursuant to § 418.10(a) of the California Code of Civil Procedure, on August 14, 1974. Appellant appeared specially before respondent Court on September 18, 1974, to present the motion, which was denied by respondent on September 27, 1974. Appellant then filed a Petition for Writ of Mandate on October 10, 1974, pursuant to Section 418.10(c) of the Code of Civil Procedure, requiring respondent Court to enter its order quashing the service of summons. Said petition was denied by the Honorable Lloyd A. Phillips, Jr. on November 21, 1974. Tams-Witmark now appeals from the denial of its petition for a writ of mandate.

I

RESPONDENT COURT LACKS JURISDICTION OVER APPELLANT BECAUSE "MINIMUM CONTRACTS" BETWEEN APPELLANT AND THE STATE OF CALIFORNIA ARE LACKING

California Code of Civil Procedure § 410.10 provides:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of the United States.

This statute has the effect of making the limits of California jurisdiction coextensive with the requirements of the Due Process Clause of the Fourteenth Amendment. *Belmont Industries, Inc. v. Superior Court,* 31 Cal.App.3d 281 (5th Dist. 1973).

Federal constitutional law requires that in order for the courts of a state to assert jurisdiction over a foreign corporation, the corporation must have sufficient contacts with the state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial

justice'." *International Shoe Co. v. Washington,* 326 U.S. 310, 316-17 (1945).

> A defendant not literally "present" in the forum state may not be required to defend itself in that state's tribunals unless the "quality and nature of the defendant's activity" in relation to the particular cause of action makes it fair to do so.

Buckeye Boiler Co. v. Superior Court, 71 Cal.2d 893, 898 (1969).

Although the trend has generally been toward reducing the "minimum contacts" required for a constitutional exercise of personal jurisdiction over an out-of-state defendant, the U.S. Supreme Court has cautioned that:

> it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the minimal contacts with that state that are a prerequisite to its exercise of power over him.

Hanson v. Denckla, 357 U.S. 235, 251 (1945). California courts have, accordingly, refused to exercise jurisdiction over foreign corporations where the requisite minimal contacts have not been present. See, *e.g., Belmont Industries, Inc. v. Superior Court,* 31 Cal.App.3d 281 (5th Dist. 1973); *Interdyne Co. v. SYS Computer Corp.,* 31 Cal.App. 3d 508 (2nd Dist. 1973); *Vibration Isolation Products, Inc. v. American Nat'l. Rubber Co.,* 23 Cal.App.3d 480 (2nd Dist. 1972); *Tiffany Records, Inc. v. M.B. Krupp Distributors, Inc.,* 276 Cal.App.2d 610 (2nd Dist. 1969). This is such a case.

As the Affidavit of Robert A. Hut* attests, Tams-Witmark is not "present" in California. It neither owns nor occupies any real property within the State. Furthermore, it has at no time had employees, agents, or representatives of any kind in the State of California. In that very important respect it differs from the defendants in such cases as *Ault v. Dinner for Two, Inc.*, 27 Cal.App.3d 145 (4th Dist. 1972), and *National Life of Florida Corp. v. Superior Court*, 21 Cal.App.3d 281 (4th Dist. 1971).

The basis of Tams-Witmark's small degree of contact with the State of California is the fact that it licenses persons and groups within this State to produce copyrighted musical plays. (See Hut Affidavit, page 1.) As the Affidavit of Robert A. Hut shows, Tams-Witmark accepts orders from California customers by telephone or mail in New York. The contracts that have led to this lawsuit were therefore entered into in New York, not in California. See *Pacific National Bank of San Francisco v. Covington Investment Co.*, 169 Cal.App.2d 868 (1st Dist. 1959). In addition, the principal act of performance of any such contract—namely, the granting of permission to produce a given play—is embodied in the act of accepting the customer's order; it is performed in New York, by telephone or mail. Merely communicating with California residents from outside the state in this fashion, although on a regular basis and for a business purpose, is clearly not enough to support California jurisdiction. *Interdyne Co. v. SYS Computer Corp., supra; Tiffany Records, Inc. v. M.B. Krupp Distributors, Inc., supra.*

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*This affidavit is contained in the Supplemental Clerk's Transcript filed with this Court pursuant to this Court's Order, dated March 27, 1975 granting the motions of appellant and respondent to augment the record herein.

Tams-Witmark's only direct physical contact with the State of California arises from the fact that appellant in effect lends musical and dialogue material to its California customers in connection with its licensing of the rights to use that material. As the Affidavit of Robert A. Hut indicates, this act is purely incidental and ancillary to the transaction of Tams-Witmark's business, which is the licensing of theatrical production rights in return for the payment of royalties. Appellant is not in the business of leasing such materials for profit.

Appellant is aware of no California decision which has upheld jurisdiction in a case such as this one involving the lending to California residents, by mail, of tangible property in connection with the sale of intangible property rights. Under these circumstances, sufficient minimum contacts do not exist.

The fact that appellant sends advertising brochures into California and advertises in a nationally-distributed magazine is not enough to tip the balance in favor of "minimum contacts." This is especially true because such advertising pertains to the licensing of theatrical production rights, which, as already argued, occurs outside of California.[1]

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1. Cf. *Cornell University Medical College v. Superior Court*, 38 Cal.App.3d 311 (1st Dist. 1974), where a California manufacturer of scientific instruments brought an action based on intransit damage to an instrument being shipped to the petitioner in New York. The court said that the fact that Cornell had sent descriptive brochures of its medical school to, and had interviewed prospective medical students at, California universities was of little importance since it was unrelated to the subject of the litigation.

II

THIS COURT LACKS JURISDICTION OVER APPELLANT FOR THE FURTHER REASON THAT THE INCONVENIENCE TO APPELLANT OUTWEIGHS THE STATE'S INTEREST IN SUING IN CALIFORNIA

Even if Tams-Witmark's dealings with California are deemed sufficient to satisfy the "minimum contacts" test, California decisions require a consideration of the inconvenience to the out-of-state defendant in requiring him to defend here.

> Once it is established that the defendant has engaged in activity of the requisite quality and nature in the forum state and that the cause of action is sufficiently connected with this activity, the propriety of an assumption of jurisdiction depends upon a balancing of the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction.

Buckeye Boiler Co. v. Superior Court, 71 Cal.2d 893, 899 (1969). The interest of the state in providing a forum for its residents, the relative availability of evidence and the burden of defense and prosecution in one place rather than another, and the ease of access to an alternative forum, are among the factors relevant to the determination of whether jurisdiction may constitutionally be assumed. *Fisher Governor Co. v. Superior Court,* 53 Cal.2d 222 (1959).

These considerations reinforce the conclusion that jurisdiction over Tams-Witmark would be unconstitutionally unfair in this case. Defending in California obviously represents a burden for a New York corporation, especially

where, as here, most of the documents and witnesses needed to supply evidence with respect to the only factual issue in the case—the amount and nature of appellant's transactions with California residents—are located in New York.[2]

Although this burden is not an unusually heavy one, it suffices to outweigh the state's relatively small interest in providing a forum for itself to sue for allegedly delinquent taxes.

The "interest of the state" of which the Supreme Court spoke in *Buckeye Boiler, supra*, refers, we submit, to the interest of the state as the provider of a forum rather than as a litigant. Thus, while at first glance it might seem that the state has a great interest in assuming jurisdiction in a suit to recover taxes, its interest as a provider of a forum is actually far less in such a case than in cases based on personal injuries to or contractual disputes concerning its citizens. In *McGee v. International Life Ins. Co.*, 355 U.S. 220, 226 (1958), in which a California resident was permitted to sue a foreign corporation in California purely by virtue of the corporation's having entered into a life insurance contract with the plaintiff, the United States Supreme Court explained its decision with no more than the following:

> It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant state in order to hold it legally accountable.

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2. The state has in prior administrative proceedings estimated the amount of appellant's California business upon which the tax is based as averaging approximately $10,950 per year over a four-year period. This estimate was based on information obtained from the New York State Department of Taxation and Finance.

When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof.

It is submitted that the other major group of cases which has greatly extended the concept of "minimum contacts"—the group of cases, like *Buckeye Boiler,* involving personal injuries caused by a defective product which has been brought into the state in the ordinary course of business—has also been the result of policy considerations; the implicit rationale of those cases is that the average citizen ought not to have to chase to a distant state the manufacturer who has sold goods in interstate commerce knowing of the possibility of resulting physical injury to purchasers. In each of those cases, as in *McGee,* the relative positions of the plaintiff and the defendant are such that it is fair to require the defendant to defend himself in California. No such compelling interests are present in this case. The state is easily able, as most of its citizens are not, to bring suit in another state.[3]

III

CONCLUSION

In summary, this is simply not a case in which the nature of appellant's contacts with the state and the interest of the state in assuming jurisdiction are such that it would be constitutionally fair to require Tams-Witmark to defend itself in California. For this reason, appellant respectfully

3. The fact that Tams-Witmark has gone to the trouble and expense of contesting the tax which the State seeks to collect at an earlier administrative proceeding can have no bearing upon the determination of whether it is fair to require Tams-Witmark to appear in the present judicial proceeding.

asks that this Court reverse the denial by the Superior Court of appellant's petition for a writ of mandate requiring respondent Court to enter its order quashing the service of summons.

Dated: April ? 1975

Respectfully submitted,

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By .....
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